-----Original Message-----
From: Wall Judith M
Sent: Friday, December 16, 2005 12:06 PM
To: Olson Nina E
Cc: Sands Francine M
Subject: FW: OICs processed at the end of year--IRS guidance

Nina/Francine--regarding the case where the OIC is signed by an IRS official in December, but not actually mailed until January, please see processing advice posted by Appeals in email below. Fred Schindler is also checking with Mike McDermitt to see what advice he has out and what is in IRM. I'm attaching counsel's legal opinion just to keep everything together for you. << Message: OIC Memo--which refunds is the IRS entitled to retain? >>

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Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:CBS:B02:WFConroy
POSTN-145258-05

date: November 23, 2005

to: Judith M. Wall
Special Counsel (National Taxpayer Advocate Program)

from: Michael L. Gompertz
Senior Technician Reviewer, Branch 2
Collection, Bankruptcy & Summonses

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subject: OIC Refund Waivers

This memorandum replies to your request for formal assistance in reconciling two opinions issued by SBSE, which reach opposite conclusions on similar facts regarding whether the Service can keep a refund claimed by a taxpayer who has entered into an offer in compromise (OIC).

Item 8(g) of Form 656, Offer in Compromise, provides that the Service will keep as additional consideration for the offer refunds due "for tax periods extending through the calendar year that the IRS accepts the offer." Treas. Reg. § 301.7122-1(e)(1) explicitly states than an OIC "has not been accepted until the IRS issues a written notification of acceptance to the taxpayer or the taxpayer's representative." In each case submitted for our consideration, the written notification of acceptance contained erroneous language favorable to the taxpayer concerning the Service's right to retain tax refunds. The language was inconsistent with Item 8(g) and Treas. Reg. § 301.7122-1(e)(1).

The principal question presented is whether the taxpayer is entitled to rely on the erroneous language in the acceptance letter. A related question is whether the agreement between the parties should be "equitably reformed" to reflect the parties' mistaken belief as to the calendar year in which the offer would be accepted.

ISSUES

1. Is the taxpayer entitled to rely on the erroneous language of the acceptance letter that describes the refunds the Service is allowed to retain?

2. Should the agreement between the parties be "equitably reformed" to reflect the parties' mistaken belief (or prediction) that the offer would be accepted in the year immediately preceding the year in which the offer was actually accepted? For purposes of discussion, we assume that the taxpayer and all the Service employees involved in

considering the offer held the mistaken belief. We also assume that the belief was reasonable under the circumstances.

CONCLUSIONS

1. The parties are subject to the requirements of section 7122 and the regulations thereunder in negotiating and entering into an OIC. Item 8(g) of Form 656 entitles the Service to keep refunds for tax periods extending through the calendar year in which the Service accepts the offer. An offer is accepted on the date the Service issues a written notification of acceptance to the taxpayer. Treas. Reg. § 301.7122-1(e)(1). Item 8(g) must be applied in accordance with the regulations, which are strictly construed. Also, the parol evidence rule applies to Form 656 because Form 656 is an "integrated" agreement that embodies the entire agreement between the parties. Under the parol evidence rule, Item 8(g) cannot be contradicted or superseded by extrinsic evidence that the taxpayer may consider relevant in determining which refunds the Service is entitled to retain, e.g., the erroneous language in the letter of acceptance or the dates on which Service employees signed the Form 7249, Offer Acceptance Report, thereby expressing approval of the offer.

2. The Form 656 cannot be "equitably reformed" because there was no mutual mistake of material fact. At most, there was a mistaken belief or prediction on the part of the taxpayer and Service employees that the offer would be accepted in the year immediately preceding the actual year of acceptance. That does not represent a mistake of material fact that would provide a basis under the regulations for reformation of the agreement. This conclusion is supported by case law, which establishes that reformation is not permitted when there is a mistaken belief or prediction as to whether (or when) a future event may occur. In this case, the parties may have been mistaken as to when the letter of acceptance would be dated and mailed, but this represents a mistaken belief as to the timing of a future event, not a mistake concerning a present or existing fact, e.g., the dollar amount of the settlement or the taxable years at issue.

FACTS

Each taxpayer received an acceptance letter from the Service stating that the Service would retain refunds for any calendar year ending with the year before the year in which the acceptance letter was dated and mailed.

Situation 1

The taxpayer signed a Form 656, Offer in Compromise, on October 18, 2002, with respect to an outstanding liability of $103,541. Item 8(g) of the Form 656 provides that one of the conditions the taxpayer understands and agrees to in submitting the offer to compromise is:

> As additional consideration beyond the amount of my/our offer, the IRS will keep any refund, including interest, due to me/

> us because of overpayment of any tax or other liability, for tax periods extending through the calendar year that the IRS accepts the offer. I/We may not designate an overpayment ordinarily subject to refund, to which the IRS is entitled, to be applied to estimated tax payments for the following year. This condition does not apply if the offer is based on Doubt as to Liability.

Item 8(h) of the Form 656 further provides, "I/We will return to the IRS any refund identified in (g) received after submission of this offer. This condition does not apply to offers based on Doubt as to Liability." A Form 7249, Offer Acceptance Report, was signed by the appeals officer on October 28, 2002, by Associate Area Counsel (SBSE) on November 11, 2002, and by the Area Director on December 4, 2002. The Service's acceptance letter addressed to the taxpayer was signed by the Area Director and is dated January 9, 2003. It states in part:

> We have accepted your offer in compromise signed and dated by you on October 18, 2002. The date of acceptance is the date of this letter. Our acceptance is subject to the terms and conditions stated on the enclosed Form 656 Offer in Compromise.
>
> Please note that the conditions of the offer require you to file and pay all required taxes for five years or until the offered amount is paid in full, whichever is longer. This will begin on the date of this letter. Additionally, please remember that the conditions of the offer include the provision that as additional consideration for the offer, we will retain any refunds or credits which you may be entitled to receive for 2002 or for earlier years. This includes refunds you receive in 2003 for any overpayments you made toward tax year 2002 or toward earlier tax years. (emphasis added.)

Subsequently, the taxpayer claimed a refund on his 2003 tax return, which the Service had kept pursuant to Item 8(g) of the Form 656. The taxpayer filed a Form 848, Claim for Refund and Request for Abatement, for $6,637 for the year 2003. In the refund claim the taxpayer states that after filing the OIC he did not hear anything from the Service until he contacted the appeals officer on December 23, 2002. In an informal discussion, the appeals officer advised the taxpayer that "the settlement had been approved and that the final paperwork was being processed but was delayed as a result of the holidays." The refund claim states that the taxpayer received an acceptance letter "that bears a physical date of January 9, 2003" and notes that "the acceptance letter also clearly states in paragraph two that the IRS would retain any refunds or credit that the taxpayer was entitled to receive for 2002 or any earlier year." The refund claim contends, "We believe that the physical date stamp of the acceptance letter is not the date the offer was accepted. Any delays due to the holidays are ministerial in nature and not caused by the taxpayer. Such delays have now caused economic hardship to

the taxpayer." The taxpayer asked that the acceptance letter be corrected to reflect the actual date the offer was accepted.

Manhattan Area Counsel (SBSE) advised TAS that the Service acted correctly in retaining the refund for the 2003 year. The memorandum concludes that the language in the acceptance letter incorrectly stating that the Service would only retain refunds for 2002 and earlier years was a unilateral mistake of law that did not modify the OIC and that is not binding on the Service.

Situation 2

The taxpayer submitted his offer to compromise on November 17, 2003. The Form 7249, Offer Acceptance Report, was signed on November 20, 2003, by an appeals officer and forwarded to a manager for approval. On December 22, 2003, the manager signed the Form 7249 approving the offer and also signed the acceptance letter to the taxpayer. The acceptance letter stated that the Service will retain any refunds or credits that the taxpayer may be entitled to for 2003 and earlier tax years. The acceptance letter and the file were then transmitted to a centralized OIC unit for processing. The acceptance letter was mailed to the taxpayer in 2004, with a hand-written date of January 16, 2004. The taxpayer claimed a refund of $2,466 on his 2004 income tax return, which the Service Center froze in order to apply against employment taxes that were compromised in the OIC.

Oklahoma Associate Area Counsel (SBSE) advised the Local Taxpayer Advocate that the Service's right of setoff was expressly limited by the language in the acceptance letter. Oklahoma Counsel concluded that there was a meeting of the minds between the Service and the taxpayer that the Service would only retain refunds through 2003, the year stated in the acceptance letter. Thus, the Service should not retain the refund for 2004, the year that the acceptance letter was dated and mailed. Oklahoma Counsel also noted that "no court would allow" the Service to retain the refund, because the Service unnecessarily delayed the mailing of the acceptance letter to the taxpayer and the delay should not prejudice the taxpayer.

DISCUSSION

OIC Processing and the Waiver of Refunds

An OIC is an agreement between a taxpayer and the Service that settles a tax liability for less than the full amount owed by the taxpayer. A taxpayer initiates the process by submitting an offer to compromise on Form 656. The offer "must be made in writing, must be signed by the taxpayer under penalty of perjury, and must contain all the information prescribed or requested by the Secretary." Treas. Reg. § 301.7122-1(d)(1). An offer "has not been accepted until the IRS issues a written notification of acceptance to the taxpayer or the taxpayer's representative." Treas. Reg. § 301.7122-1(e)(1). See also Rev. Proc. 2003-71, 2003-2 C.B. 517, § 8.01 ("Acceptance is effective as of the date on the acceptance letter.") The taxpayer may withdraw an offer to compromise at

any time before the Service accepts the offer. Treas. Reg. § 301.7122-1(d)(3); Rev. Proc. 2003-71, § 7.01. If the Service issues a written notice of acceptance and thereby accepts the offer, the liability of the taxpayer is, in general, conclusively settled. The regulations provide, however, that the case may be reopened if there was a mutual mistake of material fact sufficient to cause the agreement to be reformed or set aside, if the taxpayer's ability to pay or assets were concealed, or if false information or documents were supplied in conjunction with the offer. Treas. Reg. § 301.7122-1(e)(5).

Section 4.01 of Rev. Proc. 2003-71 provides that none of the standard terms of Form 656 may be stricken or altered. See also IRM 5.8.1.9.5(1) ("Taxpayers must agree to all the standard conditions of the agreement as they are printed on the Form 656."). IRM 5.8.6.5(1) notes that "Form 656 contains a term which waives refunds and overpayments for all tax years through the year the offer in compromise is accepted. This waiver is a standard term, which cannot be altered." [1]

Application of General Principles of Contract Law

A compromise under section 7122 is treated by the courts as a contract between the taxpayer and the Service. United States v. Lane, 303 F.2d 1, 4 (5th Cir. 1962); United States v. Feinberg, 372 F.2d 352, 356 (3d Cir. 1967); Roberts v. United States, 242 F.3d 1065, 1068 (Fed. Cir. 2001); Dutton v. Commissioner, 121 T.C. 133, 138 (2004). Traditional rules of contract law generally apply to OICs, except to the extent these rules are inconsistent with section 7122 and the regulations thereunder. For example, although a contract may be oral under traditional rules of contract law, the regulations require that OICs be in writing. The provisions of section 7122 for compromising a liability are exclusive and are construed strictly. Botany Worsted Mills v. United States, 278 U.S. 282, 288 (1929); Bowling v. United States, 510 F.2d 112 (5th Cir. 1975) ("Because of this exclusive method, no theory founded upon general concepts of accord and satisfaction can be used to impute a compromise agreement.").

The first issue stated above involves two relevant principles of contract law that are consistent with the requirements of section 7122 and the regulations thereunder. The first principle is the "mailbox rule" of common law rule, which establishes when an offer is accepted and when the agreement thereby comes into existence. Under the common law, "an acceptance is effectively communicated when it is put out of the possession of the offeree as, for example, into a public mail box." Perillo, Calamari & Perillo on Contracts, § 2.23 (5th ed. 2003). The mailbox rule is in effect in almost all U.S. jurisdictions. Id. This rule is consistent with Treas. Reg. § 301.7122-1(e)(1), which provides that an offer "has not been accepted until the IRS issues a written notification of acceptance to the taxpayer or the taxpayer's representative."

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[1] The waiver of refund, by its terms, does not apply to offers accepted on the basis of doubt as to liability, and may be altered by agreement if the offer is based on public policy/equity considerations. IRM 5.8.6.5(3) provides, "In order to remove the waiver of refund provision for these types of offers, both the taxpayer and the investigating employee must sign an agreement and include it with the accepted offer in compromise. See Exhibit 5.8.6-3." Exhibit 5.8.6-3 is a collateral agreement providing that Items 8(g) and (h) of Form 656 will not apply to the OIC. No such agreements were executed in these cases.

The second relevant principle of common law is the parol evidence rule. "Generally stated, this rule prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing." Lord, 11 Williston on Contracts, § 33:1 (4th ed. 2005). Further, "[t]he parol evidence rule applies only when the parties integrate their agreement, that is, when they mutually consent to a certain writing or writings as the final statement of the agreement or contract between them. Only when an integrated contract exists and its meaning differs from extrinsic evidence offered by one of the parties does the parol evidence rule come into play. Its application and effect are unitary—the exclusion of all inconsistent extrinsic evidence as defined under the rule." Id. at § 33:14. United States v. Donovan, 348 F.3d 509 (6th Cir. 2003), supports the application of the parol evidence rule to OICs. The court stated in reference to an OIC:

> The question of whether the language of an agreement is ambiguous is a question of law. . . . Once the language of a contract has been held to be ambiguous, the interpretation of such language is a question of fact that turns on the intent of the parties. . . . A court, however, may not use extrinsic evidence to create an ambiguity; the ambiguity must be "apparent on the face of the contract." . . .
>
> The district court first found that the terms of the contract were clear and unambiguous. Having done so, it was error for it to go on and attempt to discern the intent of the parties. The intent of the parties is best determined by the plain language of the contract.

348 F.3d at 512 (citations omitted and emphasis added).[2] Robbins Tire and Rubber Co. v. United States, 462 F.2d 684 (5th Cir. 1972), further supports the application of the parol evidence rule to OICs. The court concluded that the provisions of Form 656 allowing the Service to retain refunds were clear and unambiguous. A taxpayer filed suit to recover a refund for its fiscal year ending in the calendar year (1964) in which its

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[2] United States v. Donovan addressed whether a letter from the Service acknowledging the withdrawal of an OIC varied the terms of Form 656. The taxpayer withdrew his offer to compromise by letter dated April 18, 2000, and the Service replied with a letter dated April 28, 2000, acknowledging that the offer was withdrawn on April 18. The Service contended that the offer, although withdrawn, remained pending until April 28, the date of the Service's letter. The date that the offer was considered "no longer pending" affected the timeliness of subsequent collection action taken by the Service. The court determined that the key language of Form 656 was unambiguous on its face. The key language provided that the collection statute is suspended while an offer is pending, and that an offer remains pending until an authorized IRS official acknowledges withdrawal of the offer in writing. The government argued, and the court agreed, that the language of the Service's letter acknowledging that the offer was withdrawn on April 18 did not affect the Form 656 waiver of the statute of limitations. Because the Form 656 terms regarding the suspension of the collection statute were clear and unambiguous, it was not appropriate to attempt to discern the intent of the parties

offer was accepted. The Fifth Circuit agreed with the government that the refund waiver in the OIC was unambiguous as a matter of law and that the government was entitled to a directed verdict. 462 F.2d at 688. The Fifth Circuit stated, "Even if we were to agree that it would be literally possible to read Paragraph 3(b) as a disjunctive offer by a taxpayer proposing settlement to forego overpayment claims either (a) for all periods ending prior to the calendar year of acceptance [1964] or (b) only for periods ending during that calendar year, assigning such a meaning to the offer of compromise in the case at bar results in a wholly unreasonable construction of its terms under the circumstances present here." 462 F.2d at 687. Because the Fifth Circuit determined as a matter of law that "no ambiguity existed in the contractual writings," Id. at 688, the Fifth Circuit concluded that the district court had erred in permitting the taxpayer to introduce parol evidence of the intentions of its representatives at the time of making the offer. The district court also erred in permitting the parties to produce expert testimony as to the meaning of the language in the Form 656 concerning the Service's right to retain refunds. The Fifth Circuit accordingly reversed the jury verdict in favor of the taxpayer that it was entitled to retain the 1964 overpayment.

Keating v. United States, 794 F. Supp. 888 (D. Neb. 1992), also supports the conclusion that the terms of Form 656 concerning retention of refunds by the Service are clear and unambiguous and these terms cannot be contradicted or superseded by parol or extrinsic evidence. This case concerned a married couple who entered into an OIC and later contended that the Service wrongfully withheld their 1987 refund because the OIC had been amended so as to permit the taxpayers to keep their 1987 refund. The taxpayers' original $21,000 offer, submitted on Form 656 on September 9, 1987, and containing the standard refund waiver term, was not accepted by the Service. After negotiations, the taxpayers submitted a letter in 1988 amending their offer to increase the settlement amount to $30,000 in exchange for the Service's agreement to eliminate its demand for a collateral agreement on future income. The court stated, "These amendments and other terms of the offer were memorialized in various letters between the parties subsequent to the submission of the original Form 656. At no time did the IRS demand, nor did the [taxpayers] submit, another Form 656 containing these amendments. However, the correspondence often referred back to the pending Offer in Compromise." 794 F. Supp. at 889. The taxpayers argued that the oral and written agreements reached after submission of the Form 656 superseded the Form 656. The government contended that the OIC "was completely integrated and wholly unambiguous" and parol evidence could not be considered by the court for the purpose of "varying or contradicting" the paragraph in the Form 656 concerning retention of refunds by the Service. Id. at 890. The court rejected the taxpayers' challenge, stating that the taxpayers "had presented no competent evidence of an amendment to the offer in compromise." Id. at 891.

ISSUE 1

Treas. Reg. § 301.7122-1(e)(1) and the "mailbox rule" of common law independently establish that the taxpayer's offer in Situations 1 and 2 above was accepted only when

the Service mailed the acceptance letter, and not during the prior calendar year in which the Area Director or other Service employees approved acceptance of the offer by signing Form 7249, Offer Acceptance Report. See also Rev. Proc. 2003-71, § 8.01, supra. Prior to the mailing of the acceptance letter, the agreement between the parties had not come into being and the taxpayer was thus free to withdraw the offer. Treas. Reg. § 301.7122-1(d)(3); Rev. Proc. 2003-71, § 7.01. As a matter of law, therefore, there was no ambiguity as to the calendar year in which the offer was accepted in Situations 1 and 2. It follows that there was no ambiguity as to which refunds the Service was entitled to retain under the provisions of Item 8(g) of Form 656, Offer in Compromise. The Service was allowed to retain refunds for the year in which the acceptance letter was mailed and prior years. Any other conclusion would represent a departure from the case law cited above requiring strict compliance with the provisions of section 7122 and the regulations thereunder. Based on the regulations, therefore, the taxpayer cannot reasonably rely on the erroneous language in the acceptance letter as to which refunds the Service was allowed to retain. Similarly, the taxpayer cannot rely on the Form 7249, Offer Acceptance Report, and the dates indicated therein on which Service employees signed the Form 7249 to establish that the offer was "actually" accepted in the calendar year prior to the year in which the acceptance letter was dated and mailed. Thus, the Service cannot "correct" its acceptance letter to show the previous year as the year of acceptance as the claim for refund in Situation 1 requests. Even if the taxpayer and employees of the Service reasonably believed that the offer would be accepted during the previous year, this belief would not change the actual year of acceptance under the regulations.

The conclusions stated above are supported by additional legal and factual considerations. We first note the applicability of the parol evidence rule. The parol evidence rule applies to the Form 656 because the Form 656 is an "integrated" agreement in that it embodies the entire agreement between the parties. The Form 656 contains detailed terms and provisions that establish all the rights and obligations of the parties and the Form 656 represents the final and complete expression of the agreement between the taxpayer and the Service. Because the Form 656 is an integrated agreement and because there is no ambiguity as to which refunds the Service is entitled to retain (see preceding paragraph), the parol evidence rule bars reliance by the taxpayer on the erroneous language of the acceptance letter as a means of "interpreting" the provisions of Item 8(g) of Form 656. Any such reliance by the taxpayer would not truly be for the purpose of interpreting or clarifying the provisions of Item 8(g) but, rather, for the purpose of contradicting the plain meaning of Item 8(g) as properly interpreted in accordance with the regulations (or the mailbox rule of common law). Our position is the same as the government's position in Keating, supra, that the Form 656 is "completely integrated and wholly unambiguous" and thus parol or extrinsic evidence cannot be introduced "for the purposes of varying or contradicting" Item 8(g). 794 F. Supp. at 890. Thus, the taxpayer cannot rely on the erroneous statement in the acceptance letter or on the Form 7249, Offer Acceptance Report, to establish when the offer was accepted or which refunds the Service is entitled to retain.

Our conclusion in regard to the application of the parol evidence rule is supported not only by Keating, but also by Robbins Tire & Rubber Co. and Donovan. In Robbins Tire & Rubber Co. the Fifth Circuit concluded as a matter of law that no ambiguity existed in the provisions in the Form 656 relating to the refunds which the Service was entitled to retain. Although Donovan did not concern the provisions of Form 656 relating to the retention of refunds, Donovan states that a court may not use extrinsic evidence to create an ambiguity. 348 F.3d at 512. Rather, the ambiguity must be "apparent on the face of the contract." Id. (citation omitted). As in Donovan, there is no ambiguity "apparent on the face" of the Form 656 as to the Service's right to retain refunds.

Moreover, the statement accepting the taxpayer's offer is the only legally operative language in the acceptance letters in Situations 1 and 2 because the Form 656 (and not the acceptance letters) comprises the entire agreement between the parties. Also, we note an internal inconsistency in the acceptance letter in Situation 1. The January 9, 2003, acceptance letter stated, "The date of acceptance is the date of this letter. Our acceptance is subject to the terms and conditions stated on the enclosed Form 656 Offer in Compromise." The quoted sentences indicate that the refund for 2003 could be retained by the Service, but the letter also states that the Service will retain refunds for 2002 and prior years. This internal inconsistency further supports our conclusion that the acceptance letter cannot be viewed as modifying or superseding Form 656, Item 8(g). Further, assuming the acceptance letter in Situation 1 or 2 did purport to change the terms of the Form 656, Item 8(g), it would then be questionable whether a compromise agreement had been reached by the parties. An essential prerequisite to the formation of a contract is a mutual manifestation of assent to the same terms. Under the "mirror-image rule" of common law, an acceptance must mirror the offer in all material respects. If it changes the terms of the offer in any material respect (e.g., if it changes the consideration offered), it is not an acceptance and no contract has been formed. Calamari & Perillo on Contracts, § 2.21(a).

Thus, rather than changing the terms of the offer, the acceptance letter in each case simply contained an erroneous statement as to the refunds which the Service was entitled to retain. This erroneous statement is not part of the agreement and the taxpayer cannot rely on the statement. The agreement is limited to the provisions of Form 656, interpreted in accordance with the regulations, and does not include the erroneous statement contained in the letter of acceptance.

ISSUE 2

The taxpayer in each situation may argue that the parties (both the Service and the taxpayer) mistakenly believed that the offer would be accepted in the calendar year prior to the year in which the offer was actually accepted and that the Form 656 should thus be equitably reformed to reflect the parties' true intent, as expressed in the acceptance letter. They may further argue that unless the Form 656 is equitably reformed, the Service will receive an undeserved windfall at the expense of the taxpayer by being allowed to retain the refund for the calendar year in which the offer was actually accepted.

The foregoing arguments should be rejected. It is true that some courts permit a writing to be reformed when the writing does not reflect the parties' actual contractual intent. See Calamari & Perillo on Contracts, §§ 9.31--9.36. However, the general equitable principles regarding reformation do not apply because the regulations provide a specific rule regarding reformation that controls the outcome in this case. Treas. Reg. § 301.7122-1(e)(5)(iii) provides, in part, that although acceptance of an offer will, in general, conclusively settle the tax liability, an exception is provided in the case of a "mutual mistake of material fact sufficient to cause the offer agreement to be reformed or set aside." (emphasis added.) The present cases do not involve a mutual mistake of material fact, e.g., a mutual mistake as to the dollar amount of the settlement or the taxable years involved.

The taxpayer cannot demonstrate the existence of a mutual mistake of material fact because there was no mistake as to a present or existing fact that would warrant reformation as, for example, when A agrees to purchase B's 2004 Mercedes for $25,000, but the contract erroneously refers to the 2001 Mercedes that B also owns. The mistake in Situations 1 and 2 does not relate to a present or existing fact but, rather, represents a mistaken belief or prediction as to a future event, i.e., when (and whether) the offer would be accepted. The courts have held that a contract will not be reformed on the basis of the parties' "incorrect prediction regarding the future." Westinghouse Electric Corp. v. United States, 41 Fed. Cl. 229, 237 (1998) (plaintiff contractor was not entitled to reformation when it made a low bid on a Navy contract for several fiscal years based on its erroneous beliefs that (1) it would be the sole-source provider throughout the entire term of the warfare system program and (2) its only competitor would not be able to submit a winning bid for future years). The party seeking reformation "must show that the parties to the contract held an erroneous belief as to an existing fact." Id. (citing Dairyland Power Cooperative v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994)).

Thus, the offer in compromise in each situation described above cannot be equitably reformed to reflect the provisions of the acceptance letter. "The purpose of reforming a contract on the basis of mutual mistake is to make a defective writing conform to the agreement of the parties upon which there was a meeting of the minds." Westinghouse Electric Corp., 41 Fed. Cl. at 238 (citation omitted). There can be no agreement or meeting of the minds as to whether (or when) a future event will occur because this concerns "an unknowable fact, and the parties could not have made a mutual mistake about it." Id. Thus, whether (or when) a taxpayer's offer to compromise a tax liability will be accepted by the issuance of a formal notification of acceptance is inherently an unknowable fact and there can be no mutual mistake as to such a fact. See also Lord, 27 Williston on Contracts, § 70:5 (4th ed. 2005) ("Erroneous predictions as to the future generally do not warrant equitable reformation or rescission of contracts.").

If you have questions concerning this matter, please contact William F. Conroy at (202) 622-5484.